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No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
AND
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OBJECTION OF PETITIONER NORTHWEST AIRLINES, INC. TO MOTION OF MARY P. LAFFEY *Et Al.* FOR LEAVE TO FILE BRIEF AS *Amici Curiae*

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Petitioner Northwest Airlines, Inc. respectfully submits this memorandum in accordance with Rule 36.3 of the Rules of the Supreme Court to explain why it has objected to the filing of the proposed *amici* brief of Mary P. Laffey *et al.* and why leave to file that brief should be denied. Although petitioner has waived any objections to other *amici* briefs that have been submitted in support of respondents, the *amici* brief of these movants is untimely, irrelevant, and erroneous.

STATEMENT

Movants Mary P. Laffey *et al.* are the named plaintiffs in the Title VII and Equal Pay Act litigation—the so-called "*Laffey*" case[1]— out of which the present contribution action arises. They are not parties to this action, profess to have no interest in the legal issues raised in the contribution suit, and do not move to file an *amici* brief in support of any party. *See* Motion at ¶¶ 2, 4, 6. Instead, movants seek leave to file a brief as *amici curiae* only to make a presentation on the facts of the underlying *Laffey* litigation. Movants themselves, however, acknowledge that determination of the facts found in *Laffey* is "wholly irrelevant to the legal issues before this Court." Motion at ¶ 2.

Although petitioner is fully prepared, if necessary, to meet this presentation on its own terms (*see* pp. 6-10, *infra*), the movants' efforts to precipitate litigation of the facts of a collateral case would be at odds with this Court's Rules and would complicate the just and expeditious resolution of this case. Specifically:

(1) The motion for leave to file is out of time under Rule 36 of the Rules of this Court.

(2) Rule 36 permits the filing of an *amicus* brief addressed to the legal issues in the case, not a highly partisan (and misleading) account, like movants' presentation, of background facts concerning a separate litigation.

(3) In all events, the motion for leave to file should be denied because the proposed *amici* brief serves no legitimate interest of the movants and contributes nothing to the Court's resolution of the issues. On the contrary, the proposed brief simply interjects disputes of fact into the resolution of concededly pure questions of law.

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[1] *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part, vacated in part and remanded*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

ARGUMENT

I. THE MOTION FOR LEAVE TO FILE IS OUT OF TIME.

Rule 36.3 of the Court's Rules provides that a motion for leave to file an *amicus* brief may be made only within the time allowed for filing the petitioner's brief, if the brief, as in this case, is not submitted in support of either party. Since petitioner's brief was due (and filed) on August 29, 1980, the motion here—filed on October 25, 1980—is fatally out of time.

Movants attempt to excuse this violation of the Rules on the ground, that since they purportedly are responding to the statement of facts in petitioner's merits brief, they could not have acted earlier. The argument is both legally unsound and factually untrue. Rule 36.3 on its face makes no provision for any extensions of time, and its deadlines are mandatory. As the Rule states:

> "*No* such motion shall be received unless submitted within the time allowed . . . ." (Emphasis added.)

Moreover, prior to the filing of petitioner's brief on the merits, counsel for movants expressed an interest in filing an *amici* brief to address the facts in *Laffey*. Immediately after petitioner filed its brief, petitioner provided a courtesy copy of its brief to movants' counsel and objected to the propriety of any *amici* brief addressing factual issues in the *Laffey* case. (A copy of that letter, dated September 3, 1980, is annexed as Appendix A.) Not until *seven weeks* later did movants file their four-page motion and proposed nine-page *amici* brief. Thus, even under movants' view that the deadlines of Rule 36.3 can be waived, there would be no warrant for treating their motion as timely in this case.

II. THE PROPOSED BRIEF IS NOT AN *AMICUS* BRIEF THAT THE RULES OF THIS COURT PERMIT TO BE FILED.

Rule 36 makes no provision for third persons, like the movants here, to challenge a party's statement of facts. Rule 36

establishes procedures for the filing of an *amicus* brief, which by definition addresses questions of law through the presentation of authorities, arguments, or relevant "legislative"-type facts. Rule 36 scarcely contemplates that third persons might also advance positions regarding only the facts of the particular case or—as here—of a different case.

The function of an *amicus curiae* is to "advise the Court on the law in order that justice may be attained." *Allen v. County School Board,* 28 F.R.D. 358, 362 n.2 (E.D. Va. 1961). Indeed, Circuit Judge Bailey Aldrich only recently explained:

> "In granting permission [to file an *amicus* brief] we had assumed, wrongly, it proved, that counsel knew what an amicus is, namely, one who . . . 'for the assistance of the court gives information of *some matter of law* in regard to which the court is doubtful or mistaken,' 1 Bouvier's Law Dictionary 188 (3d ed. 1914), *rather than one who gives a highly partisan . . . account of the facts.*"

New England Patriots v. University of Colorado, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (emphasis added).

In this case the proposed *amici* brief does nothing more than "give a highly partisan . . . account of the facts." It offers no information whatever regarding any matter of law and, indeed, expressly disclaims any such purpose. Rule 36 does not authorize even the timely filing of such a document.

III. IN ALL EVENTS, THE MOTION FOR LEAVE TO FILE SHOULD BE DENIED.

Even if this Court's Rules countenanced the filing of the proposed *amici* brief, the Court should not permit it:

1. Movants have nothing to contribute to the resolution of the issues in this case. As they themselves put it, they do not "wish to state any view on the legal issues before this Court," but only to correct alleged misstatements of fact in petitioner's

merits brief. Motion at ¶ 2. Yet the facts on which the Court must decide this case are clear and not subject to dispute. They are the allegations in the complaint. As petitioner explained in its opening brief (at 2 n.2), these allegations must be taken as true, since the case comes before the Court on the motions of the respondent unions to dismiss. *See, e.g., Scheuer v. Rhodes,* 416 U.S. 232, 236-37 (1974); *Gardner v. Toilet Goods Assn.,* 387 U.S. 167, 172 (1967); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

2. As petitioner expressly stated in its brief (at 2 n.2), the references to the findings of the district court in the underlying *Laffey* litigation were simply "to provide background." Since, as movants concede, this background "recitation is wholly irrelevant to the legal issues before this Court" (Motion at ¶ 2), it could not conceivably advance consideration of this case to quarrel over the accuracy of petitioner's description of those findings.[2] In any event, the respondents and the Court are fully able, without movants' assistance, to verify petitioner's limited narration of the background. Petitioner did not refer to any obscure evidence in the *Laffey* record, but instead cited only the explicit findings in the district court's opinions in that case as published in the Federal Supplement.

3. Moreover, movants recognize that, even if this Court's opinion were to "mischaracterize" the facts in the *Laffey* litigation, that would hardly "be 'binding' upon movants or upon the lower courts in which aspects of the *Laffey* case are still being litigated." Motion at 2. In these circumstances, movants are reduced to claiming that "a declaration by this Court as to what was 'found' in *Laffey* might weigh heavily with the lower courts and thus influence the further prosecution of

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[2] It is precisely for this reason that movants were correct in expecting (*see* Motion at ¶ 2) that the respondents did not find it necessary or appropriate to make the points contained in movants' proposed brief.

the *Laffey* case." *Id.* This speculative assertion is hardly a legitimate basis for leave to file a fact-oriented brief as *amici curiae.*

4. Finally, granting the motion for leave to file would be likely to impair the just and expeditious consideration of this case by interjecting into the decision of what movants admit are "pure issues of law" (proposed brief at 2) several questions of fact that petitioner may not even have adequate space to answer in a 20-page reply brief. In their proposed *amici* brief, movants purport to correct a variety of asserted misstatements in petitioner's opening brief, but, as the following discussion illustrates (without being exhaustive), the claimed corrections themselves are highly misleading and would require their own response:

a. Movants attack petitioner for stating that the petitioner's male flight service attendants ("FSA's") received the same rate of pay as female stewardesses, without noting that FSA's had relatively limited service. *See* proposed brief at 5. But movants neglect to state that, while the FSA's played a somewhat limited role, the district court in *Laffey* found that Northwest had recently:

> "hired several male cabin attendants as 'stewards' to perform the same duties as stewardesses and FSA's *and at the same union negotiated and agreed upon rate of pay. At all all times from 1949 to the present, FSA's and stewards have been compensated at the same rate as stewardesses* of equal longevity." 366 F. Supp. at 767 (¶ 21) (emphasis added).

Thus, the point remains that male cabin attendants in significant numbers and for significant periods of time were paid the same wages as stewardesses, but less than male pursers, for performing duties that were similar to those performed by stewardesses but were thought to be less demanding than those of pursers. Even more relevantly, the district court in *Laffey*

found that this pay structure was continuously maintained pursuant to union agreement.

b. In a similar vein, movants attempt to tax petitioner with overreaching in stating that the pay differential was not merely maintained, but "established" through collective bargaining. *See* proposed brief at 5-6. The facts are, according to the *Laffey* findings, that from the first day of collective bargaining over the purser classification beginning in 1949:

> "[a] salary was established for the purser position at a rate higher than that for the stewardess position. The salary for the position has increased over time *pursuant to union negotiation and agreement.*" 366 F. Supp. at 766 (¶ 11) (emphasis added).

c. Next, movants challenge as unsupported by any *Laffey* finding petitioner's depiction of the unions' role in perpetuating the pay differential, focusing particularly on petitioner's statement at page 5 of its brief that:

> "the union demanded continuation of the [purser pay] differential (JA 17-18 ¶6). *See* 366 F. Supp. at 765-66 (¶8), 767-68 (¶23)."

See proposed brief at 6-7. Petitioner, however, properly relied for this statement on the complaint in this case, not on any *Laffey* findings, and the allegation referenced by petitioner (JA 17-18 at ¶ 6) does in fact state "that there were differentials in salary . . . between NWA's Pursers and Cabin Attendants *as demanded by* the respective union, when incumbent. . . ." (Emphasis added.)

Moreover, while that allegation must at this point be accepted as true without further support, the petitioner's additional background reference to the *Laffey* findings explains that the union in fact "opposed" a proposal by petitioner to eliminate the pay differential altogether. Movants' contrary suggestion that the unions pressed for elimination of the

differential is simply false. Indeed, the *Laffey* court expressly found "[w]hile this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise." The reasonableness of that belief rested in part, according to the court, on:

> "*the acquiescence of the stewardesses' bargaining representative in this arrangement* [and] the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy. . . ." 374 F. Supp. at 1390 (emphasis added).

Movants also claim that there is "no evidence in the *Laffey* record, and no finding, that the union, either separately or together with Northwest, ever addressed the issue whether a pay differential between pursers and stewardesses was justified by any differences in duties or responsibilities . . . ." (proposed brief at 6). Here the gratuitous comments of the would-be *amici* collide with the explicit acknowledgement by respondent Transport Workers Union in its brief in this Court that, at the time, both

> "it and NWA believed that the differential was still warranted by the duties and responsibilities of the purser and stewardess positions . . . ." (p. 26)

d. Movants similarly err in attacking petitioner's statement that the purser pay differential reflected extra duties and supervisory responsibilities that the pursers were believed to perform. *See* proposed brief at 7. As acknowledged by the respondent Transport Workers Union brief, the *Laffey* findings were to the effect that pursers were charged with different responsibilities than were other cabin attendants, 366 F. Supp. at 783-86 (¶¶ 61-63, 66-69), but that these differences were legally insufficient to justify the pay differential. *See* 366 F. Supp. at 785, 786 (¶¶ 64, 69).

e. As a last illustration, we note movants challenge to petitioner's statement (at 4) that the *Laffey* court "expressly found that Northwest had reasonable grounds for its belief that the purser position was not equal to the other cabin attendant jobs." *See* proposed brief at 8. Movants say that the "passage" on which petitioner relied in making that statement was "reversed" by the court of appeals in *Laffey* and that the district court found that "Northwest was motivated by sex in paying stewardesses less than pursers . . . ." *Id.*

These assertions seriously distort the *Laffey* record. In deciding that liquidated damages were unwarranted, the district court expressly determined:

> "While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was *not* unreasonable for the Company to have believed otherwise . . . . *The Court finds 'good faith' on the part of the Defendant* . . . . The Court does not find an intentional, bad faith, attempt to evade the law." 374 F. Supp. at 1390 (emphasis added).

Contrary to movants' assertion, this finding of petitioner's good-faith motivation was not reversed on appeal. Rather, the court of appeals ruled that some of the factors on which the district court had relied in making a separate ruling about the reasonableness of that good-faith belief were not legally relevant. *See* 567 F.2d at 463-66.

Moreover, the *Laffey* courts imposed liability on Northwest on the basis of their assumption, as explained in conjunction with the discussion of other practices, that an employer is liable for the consequences of any conduct "which was not merely accidental" and that "there is no burden to show additional discriminatory motivation in order to recover under Title VII." 567 F.2d at 454-55. *See id.* at 450-51. Whether that assumption is legally sound is debatable, but movants misstate the *Laffey* record in contending that the courts there found that

petitioner was actually motivated by sex discrimination in paying pursers more than it paid stewardesses, FSA's and stewards.

CONCLUSION

For the foregoing reasons, movants should be denied leave to file the proposed *amici* brief.

Respectfully submitted.

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October 1980

APPENDIX A

HUGHES HUBBARD & REED
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September 3, 1980

BY HAND

Michael H. Gottesman, Esquire
Bredhoff, Gottesman, Cohen, Channin, Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Northwest Airlines, Inc. v.
Transport Workers Union

Dear Mike:

As you requested, I am providing a courtesy copy of the brief that we filed on behalf of Northwest in the contribution case in the Supreme Court.

Peter Kreindler has mentioned that you are considering filing an *amicus* brief in this case.

Since it is my view that the *Laffey* plaintiffs do not have a legitimate interest in participation in the contribution case at the Supreme Court level, I believe that Northwest would challenge the submission of any such brief. In accordance with Supreme Court Rules 36.2 and 36.3, please advise me of any desire that you may have to tender an *amicus* brief so that I may formally ascertain Northwest's position.

Sincerely,

/s/
Philip A. Lacovara

Enclosure